BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH W. STROUD Claimant VS. **VAL GOTTSCHALK D/B/A VALENTINE ROOFING & WATERPROOFING, INC.** Respondent AND **TRAVELERS INSURANCE COMPANY** Insurance Carrier	)	Docket No. 195,244

ORDER

Claimant appeals from a Preliminary Order entered by Administrative Law Judge Shannon S. Krysl on December 6, 1994. The Order denies claimant's request for preliminary benefits.

ISSUES

The sole issue on appeal is whether respondent has established by a preponderance of credible evidence that claimant's intoxication contributed to the accident he suffered in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that respondent has established by a preponderance of the credible evidence that claimant's accident and disability were contributed to by his consumption of alcohol and benefits must, therefore, be denied.

Claimant suffered accidental injury on July 19, 1994 when he fell from a ladder and broke both wrists as well as his cheekbones. Claimant has stipulated to the admission of a toxicology screening that was done several hours after the accident. The test revealed a blood alcohol concentration of .162 and claimant further stipulated that his blood alcohol concentration at the time of the accident was greater than .04.

The decision in this case turns on construction and application of K.S.A. 44-501(d)(2). This statute provides in pertinent part:

> "The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol . . . It shall be conclusively presumed that the employee was impaired due to alcohol if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more."

Respondent argues that the language creating a conclusive presumption of impairment with blood alcohol of .04 or more should be construed as one creating a presumption that the consumption of alcohol "contributed to" the accident when the level is .04 or greater. To do otherwise, according to the respondent, violates established principals of statutory construction. Specifically, respondent argues that if the employer must prove contribution to the accident, even where blood alcohol is proven to be more than .04, the presumption becomes meaningless language in the statute. Claimant, on the other hand, insists respondent must prove contribution to the accident, and the facts in this case do not establish that claimant's consumption of alcohol contributed to the accident.

The starting point in interpreting a statute is the language of the statute itself. Words in common usage are to be given their natural and ordinary meaning. See Young v. Sedgwick County Kansas, 660 F. Supp. 918 (D.Kan. 1987); House v. American Fam. Mut. Ins. Co., 251 Kan. 419, 837 P.2d 391 (1992). Respondent's argument in effect asks the Appeals Board to treat "impairment" and "contribution to the accident" as the same. When the language is given its ordinary meaning, however, conclusive evidence of impairment is not equivalent to conclusive evidence of contribution to the injury.

The Appeals Board believes that the language of the statute creating the presumption of the impairment remains meaningful in the statute even if not given the construction proposed by the respondent. In this case claimant has argued that the record does not include evidence that the consumption of alcohol contributed to the accident. The Appeals Board, however, considers the evidence as to the alcohol level, which does establish impairment, to be some evidence that the consumption of alcohol contributed to the accident. The record includes evidence of other possible explanations for the accident. However, even given those possible alternatives, it appears most probable that his consumption of alcohol and resulting impairment contributed to the accident and injury. The Appeals Board, therefore, finds the decision by the Administrative Law Judge denying benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl dated December 6, 1994, should be, and the same hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Lyndon W. Vix, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director